On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution

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On The Relevance Of Philosophy To Law: Reflections On Ackerman's Private Property And The Constitution

Philip Soper*

To turn to moral philosophy these days for help in trying to decide "what to do" is a bit like turning to recipe books for help in a famine. One soon discovers that most philosophers avoid ultimate questions about actual choices in actual cases, preferring to concentrate instead on a preliminary problem: how to go about thinking about what to do. One also discovers that philosophers who have written about this preliminary problem of the structure of moral inquiry are neatly divided, as logically they must be, into precisely two camps: those who do and those who do not think that moral inquiry is exclusively a matter of trying to decide what course of action will yield the "best" overall consequences.

At least since the eighteenth century, when utilitarian versions of consequentialism confronted Kantian claims of categorical duty, proponents of each view have tried in vain to bring their counterparts to see the error of their ways. The failure of centuries of such proselytizing can hardly be charged to the primitive understanding of the heathen; both sides boast intellects too powerful for that. For some, of course, failure is proof that the debate itself is meaningless, structured around propositions that invite resolution only, if at all, in some non-rational sphere. For others, more sympathetic to the vision that motivates the enterprise, the current standoff—as well as the explanation for the fact that neither side has much to say about ultimate questions—stems from two problems. The first is what might be called the problem of collapse or congruence of result. Just when one believes he has isolated a strongly entrenched intuition, demonstrating the untenability of one theory or the other, defenders of the theory counter with a sophisticated proof that, as respects the critical intuition, both theories agree in result. If the Kantian is worried, for example, about keeping promises and not framing innocents, any Utilitarian worth his salt can do the

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1. "Consequentialism" directs only that one choose that action which will yield the "best" results, leaving open the question of which values count as "best." Classical utilitarianism, a species of consequentialism, nominated "happiness" as the candidate for "best." Modern consequentialist theories, like modern political candidates, tend to avoid taking any stand that might prove controversial with respect to this ultimate value question, urging simply that one maximize utility-of-some-sort-or-another-whatever-it-might-be. See B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 42, 72 & 221 n.7, 277 n.20 (1977).

Kantianism, of course, is not the only alternative to consequentialism, cf. id. at 41 (suggesting Marxist, Maoist, Existentialist, and Absurdist alternatives), but it is the most familiar example of a theory that insists that something else besides consequences counts in deciding what to do. Explaining what that "something else" is poses for the Kantian a problem at least as difficult as the problem the consequentialist faces in explaining what values are to be maximized and how they are to be calculated and compared. See id. at 72.
shuffle that proves that firmly held beliefs about such matters can be reconciled with a consequentialist theory. Conversely, if the Utilitarian balks at the implication that individual rights are to be respected even in the face of catastrophic consequences, the Kantian need only explain that in such extreme cases the reference to consequences might well be decisive, but that, of course, is the exception, not the heart of the matter.

The second (and related) problem is the problem of indeterminacy or vagueness when it comes to actual application of either theory. On difficult moral and social issues, the utilitarian's task of toting up and comparing consequences so outweighs in practical importance the theoretical direction that only consequences count as to make that direction mostly useless. Similarly, the Kantian's moral imperatives are either so general or so hedged with exceptions that the question of whether an actual case of any difficulty falls within the scope of a categorical imperative must remain largely unanswered.

Given these problems of collapse and indeterminacy, one might expect that a judge who has to decide concrete and difficult cases, e.g., whether government action amounts to a “taking” of “private property” for which “just compensation” is required, would not find much in moral philosophy to guide him. It will thus come as a surprise—and a pleasant one to professional philosophers—to discover that Professor Ackerman, in his delightful examination of the takings issue, Private Property and the Constitution, promises to restore followers of Plato to their rightful place as philosopher-judges, if not philosopher-kings. It is “only after resolving certain philosophical issues,” Ackerman announces, “that one can make sense of the constitutional question.” It is philosophy and “hard philosophy at that” that holds the key to the decision of these cases. Indeed, by the time he reaches his final chapter, Ackerman has painted a picture of a world of legal scholarship poised at a critical juncture where the choice of philosophical theory will determine which of drastically divergent paths the development of future doctrine will take.

The promise of philosophical resuscitation is, unfortunately, not fulfilled. Ackerman's grand claims for the difference that philosophy makes, which imply at least a partial ability to avoid the problems of collapse and indeterminacy, fail. Why they fail, and what failure portends for the value of philosophy for law are questions I shall address in this essay. But it bears emphasizing that failure to establish such a grandiose role for philosophy does not render the book useless or uninteresting. Ackerman's essay is filled with novel insights about philosophy, compensation law, state action, and

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2. An ironic modern example is that of Professor Rawls, himself a non-utilitarian, coming to the rescue of utilitarianism against the charge that the theory would permit punishing the innocent. See Rawls, Two Concepts of Rule, 64 PHILOSOPHICAL REV. 3-32 (1955). For a recent utilitarian defense of standard views about promise-keeping and similar conventions, see R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS (1975).


5. B. ACKERMAN, supra note 1, at 5.
judicial roles. Indeed, the entire work, particularly the rootnotes, provides a rich summary and often original analysis of much of the case law and commentary on the constitutional issue. All the more reason, then, to separate the questionable from the more plausible claims in the book in order to avoid slighting the contribution of the latter.

I.

To understand why the grand claims fail requires a brief excursion into Ackerman's extensive typology. Although the book abounds with matrix-like distinctions—including engaging definitions of "restrained" and "innovative" judges, who are either "activist," "reformist," or "pragmatic" in their interpretations of the takings clause—two distinctions are basic. The first is between those who approach legal analysis armed with a "Comprehensive View" and those who do not. The former are "Policymakers"; the latter are "Observers." A Comprehensive View, which a Policymaker will use to measure legal doctrine, consists of a relatively "small number of general principles," (presumed to form a self-consistent whole), "describing the abstract ideals which the legal system is understood to further." Observers, in contrast, ground legal analysis in existing social institutions and socially based expectations without assuming that all such basic social data can or ought to be organized into a comprehensive, self-consistent whole.

The second distinction concerns the language used to further legal analysis: it is "Scientific" if it uses a specialized, technical vocabulary; it is "Ordinary" if it does not. It is with the contrast between the Scientific Policymaker and the Ordinary Observer that Ackerman is primarily concerned. He sets out to show that Utilitarianism and Kantianism, the two dominant Scientific Policymaking approaches to the analysis of social issues in general and the takings issue in particular, lead in different directions and that neither of these Comprehensive Views accounts for the actual approach courts have taken. What accounts for current doctrine is the approach of the Ordinary Observer, an approach more akin in spirit to the tradition in philosophy that traces to Wittgenstein and ordinary language analysis.

To understand what Ackerman takes to be the difference between each of these philosophical perspectives, consider his analysis of the compensation question in a context that causes particular difficulty for courts today: wetlands regulations. An owner of wetlands, prevented by such regulations from filling and developing his marsh, demands compensation for the resulting loss in economic value. How should a judge react?

The Utilitarian judge, according to Ackerman, approaches the problem as if his role were that of a teacher correcting the addition problem of his students, the legislators. Presumably the regulation is justified in the first

6. Id. at 11 (footnotes omitted).
7. Id. at 177, 236-37 n.11.
place only because of a legislative determination that the actual dollar loss imposed on the landowner is more than offset by the benefits to society. But even assuming that this legislative assessment of direct benefits and costs is accurate, it is likely to have ignored or slighted two indirect costs that could alter the calculation of the regulation’s net utility. One cost is the “General Uncertainty” that results as other owners contemplate future investment decisions in the face of this assertion of legislative power to alter expectations. The second cost is the “Disaffection” that citizens will feel, even if the legislative judgment is correct—a disaffection that increases if the legislative judgment regarding benefits and costs is itself a close or controversial one. Of course, intervention to reduce these costs also occurs at a price, the price of “processing both deserving and undeserving lawsuits” brought by future litigants who, relying on the precedent established if compensation is required, will insist that they are similarly situated. Thus the judge, bent on maximizing utility, will order compensation to improve the legislature’s balance sheet whenever he estimates that these process or future settlement costs are less than the sum of Uncertainty and Disaffection costs.

8. See id. at 45, 207 n.7, 208 n.13.  
9. Ackerman reduces the textual description to a formula requiring compensation whenever $P < U + D$. The formula is virtually identical to that developed by Professor Michelman in his study of the takings issue, the only difference being that Michelman’s single category of “Demoralization” costs is broken by Ackerman into its constituent parts: “Uncertainty” and “Disaffection.” See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1215-16 (1967). Although Ackerman acknowledges his heavy debt to Michelman’s “pathbreaking analysis,” see B. ACKERMAN, supra note 1, at 49, 208 n.17, his further refinement of Michelman’s formula only highlights the indeterminacy problem: a Utilitarian judge, in calculating Disaffection costs, must take account of levels of Disaffection that will vary depending on whether citizens are themselves Utilitarians, Kantians, something in between, or none of these. See id. at 60-64. The description of the Utilitarian judge that emerges from the formula is both problematic and counterintuitive. It is problematic because it is not clear why a judge should assume that the legislature will consistently ignore or slight Uncertainty and Disaffection costs but not “direct” costs. Ackerman hints that the explanation lies in well-known institutional problems “encountered by large groups whose interests are both diffuse and transitory when they seek to organize for political action.” See id. at 207 n.8. But this explanation only shows that these costs are difficult to estimate, not that the legislature can be presumed to have slighted them. If the point is that “diffuseness” prevents those most interested from marshalling the evidence needed for an intelligent legislative estimate (of the future cost and availability of insurance, for example), that problem will confront the court, too, in its attempt to make the same estimate. Why, in short, should one assume that the court is institutionally either more likely or better equipped to make such estimates than the legislature? Ackerman offers a second explanation for a special judicial role in those cases where one might suspect governmental overvaluation of its own interests, namely, when the government is acting as entrepreneur. See id. at 51-54; note 22 infra. But this kind of bias can distort the assessment of direct costs as well as indirect. Again, one has no good explanation for why a judge should be “deferential” in reviewing the assessment of direct costs, but “activist” in reviewing the assessment of indirect costs.

The formula is counterintuitive because it requires a judge to compensate even if net benefits, after figuring in Uncertainty and Disaffection costs, are still positive. That is to say, Ackerman’s Utilitarian judge views his constitutional role as requiring him to invalidate legislation, not because the legislative allocation of resources is inefficient, i.e., because costs exceed benefits, but because it is not the most efficient allocation possible under the circumstances. By that standard, there is no reason to stop with an analysis of the particular statute that is challenged. If the legislature could have passed some other statute that would have been even more efficient, the statute under challenge should be invalidated. This peculiar view of the judge—in essence transforming him into a superlegislator who can never settle for less than best—results from ignoring the fact that the judge starts with a mandate to protect property, not a roving commission to maximize utility wherever lie can. See text accompanying note 14 infra.
The Kantian judge, in contrast, is less concerned with the bottom line of the balance sheet than with making sure it has been reached without cheating. Maximizing overall utility is fine, but if it can be done without at the same time sacrificing a single individual to the social gain, it should be. Indeed, for the Kantian, the larger society’s gain in comparison with the cost to the individual, the stronger the case for compensation of the individual; resources will still be allocated so as to benefit society but without worsening the lot of any single person. Only if process costs threaten to “eat up” the net benefits of the regulation, will the Kantian judge find himself unable to order compensation by reference to his basic principle of keeping everybody happy. Thus the Kantian judge compensates whenever the process costs are less than the difference between the legislatively assessed benefits and costs of the project.

The easiest way to explain how the Ordinary Observing judge differs from the Utilitarian and the Kantian is to reconstruct the problem that other scholars of the takings issue confronted in their attempts to find doctrinal consistency in the case law. That problem arose because the case law pointed to three paradigmatic cases in which the takings issue is fairly easily resolved without, however, revealing a consistent rationale by which to resolve more difficult, borderline cases. The first easy case is outright government appropriation of title or possession, i.e., appropriation of the right to exclude anyone, including the previous owner, from participation in deciding how the property is to be used. Under such circumstances (the invasion or appropriation test), a taking of the previous owner’s property has occurred. Second, an owner’s right to enjoy and use his property might be so restricted that even though he retains formal title and the right to exclude, the property is virtually worthless. That, too, is a taking (the diminution of value test), unless, as in the third easy case, the valuable uses of which the owner has been deprived would severely interfere with the ability of others to use and enjoy their property (the nuisance or noxious use test). Legal scholars have attempted to extract from these standard cases an underlying rationale that would facilitate a determination of whether a taking lies or lies not occurred in any case.

Ackerman’s explanation of the paradigm cases illustrates what he means by Ordinary Observing: these cases are easy because they build on an ordinary layman’s notion of what “property” is. In lay parlance, to say that a thing is one’s property is just to say that he can “use the thing in lots more ways than others can,” i.e., he has the right to exclude and use, and that others “need a specially compelling reason,” e.g., the owner’s use is a noxious use, in order to interfere significantly with the owner’s right. In this explanation we also uncover what Ackerman takes to be possibly “earth-shattering” differences between the Utilitarian, Kantian, and Ordinary Observing

10. B. ACKERMAN, supra note 1, at 73.
11. Id. at 99-100.
12. Id. at 85.
judges. The role of the Ordinary Observing judge is not to correct the calculations of the legislature or to make sure that no individual has been exploited, but simply to give judicial protection to ordinary, extant notions of what counts as property. Examples of the differences between these approaches can be seen, we are told, by contrasting the Utilitarian and Kantian responses to what are “easy cases” for the Ordinary Observer. The Ordinary Observer has no trouble, for example, explaining why compensation is required when the government takes a small strip of land for a highway, even though the economic impact on the owner is slight. But the Utilitarian should have trouble with this per se rule where title is appropriated, because some cases will seem difficult to distinguish in terms of Uncertainty and Disaffection costs from the case of land-use regulations that also affect the value of land only slightly and for which no compensation is in order. Similarly, the Ordinary Observer is equally clear that in the case of land-use regulation that only slightly affects the value or uses of the property, no taking results. But the Kantian is likely to insist on compensation in many such cases—indeed the less the economic impact of the regulation, the more likely that the net gain will exceed the process costs involved in making sure that the social benefits are secured without burdening a single individual with the costs.

II.

The claim that “Ordinary Observing” accounts for existing doctrine where Utilitarian and Kantian approaches do not is either simply false or a truism. It is a truism if one accepts the caricatures of Utilitarianism and Kantianism that Ackerman draws. Ackerman assumes that Policymaking judges approach the compensation question armed with a simple mandate either to maximize utility or to prevent the exploitation of individuals. They do not. The basic mandate that judges of either philosophical persuasion confront is the constitutional prohibition against the taking of “private property.” If Ackerman’s explanation of what “private property” means is correct, as in essence I believe it is, no sensible Utilitarian or Kantian will ignore that core of meaning, which is likely to be reflected in any ordinary use of the term. What Utilitarians and Kantians do is offer theories to explain why and how much “private property”, if any, there should be. But all such theories, however substantively divergent on the question of the legitimacy of private property, utilize concepts whose meaning must necessarily be established and recognized in advance of theoretical development in order for fruitful communication and evaluation ever to take place.

The real source of the divergence that Ackerman finds between theory

13. See id. at 70.
14. Ackerman’s analysis of the meaning of “private property” coincides in many respects with straightforward philosophical analysis of the term. See Snare, The Concept of Property, 9 AM. PHILOSOPHY Q. 200 (1972) (discussed at length in B. ACKERMAN, supra note 1, at 231 n.11).
and practice lies not in the distinction between Utilitarians, Kantians, and Observers, but in the distinction between “Scientific” and “Ordinary” approaches to the concept of property. Ackerman forces his Utilitarian judge by definition into a Scientific approach that requires him to replace the concept of property with a direct reference to the utility of the legislation that is under challenge. The philosophical parallel to this approach is found in attempts by some philosophers to reduce theoretical concepts and ordinary object-language to a technical construct, built on a combination of sense-data and “resemblance” or other relational predicates—one variety of what might be called “reductionism.” And although Ackerman is justified in noting that this Scientific approach to the subject of property—focusing not on “things owned” but on “bundles of interests or rights”—has made headway in the classroom, it is doubtful that such talk was ever meant as a substitute for the concept of property, rather than simply a device to enhance understanding of it. After all, the value of the parallel reductionist program in philosophy was never thought to lie in actually getting people to talk in terms of color patches rather than tables and chairs. Similarly, there is no more reason to expect “property” to disappear as a baseline concept for the “interests” judges discuss in takings cases, than there is to think that “freedom of speech,” “unreasonable search and seizure,” or any other constitutional concept can be swallowed up by a general direction to protect, on Utilitarian or Kantian theories, whatever “interests” are affected in these areas by official action.

Apart from this reminder that reductionism has its limits, Ackerman’s thesis cannot sustain the claims he makes for the differences among Utilitarian, Kantian, and Observing approaches. This is because until one solves the problems of collapse and indeterminacy, alleged differences in both result and methodology are impossible to verify.

Consider result first. We have seen that Utilitarians are supposedly uncomfortable with the per se rule requiring compensation whenever title is taken. But nothing is easier than to explain such rules of thumb in Utilitarian terms by reference to the very factors that the Ordinary Observer identifies. It is because of the importance that “title” and the accompanying right to exclude play in people’s ordinary expectations that, in the absence of an ability to do actual calculations of Uncertainty and Disaffection, these costs can be assumed to outweigh in every case whatever gains might result to society. Thus it is impossible to impeach the claim that on the whole it will be less costly to protect this core meaning of “property” than to try to calculate the actual costs in a particular case or to contain the disruptive effects of a presumably correct calculation. In short, the problem of in-


16. See text accompanying notes 11-13 supra.
determinacy precludes a determination that Utilitarian analysis would yield a result different from the Ordinary Observing approach. 17

As for the claim that the Kantian must insist on compensation for even the most trivial economic impact of land-use regulation (assuming net benefits after process costs remain positive), two objections occur. First, Ackerman's formula for compensation (process costs are less than net benefits) is itself a perfect illustration of the collapse problem. As Ackerman acknowledges, his Kantian, fairness-based formula reverses the normal efficiency-based explanation for compensation in such cases; that is, it finds its justification in fairness to the individual rather than in the idea that by "buying out" the individual, one makes sure that the judgment that society has more to gain than the individual has to lose is an honest one. 18 The latter is a Utilitarian explanation. 19 Even if Ackerman is right in arguing that we can look at compensation in such cases as also required by fairness, not just efficiency, to stand thus on its head "the historical connection between modern economics and nineteenth-century Utilitarian thinking" 20 is indirectly to acknowledge how easily such an acrobat may regain his normal posture. Like the drawing that can be seen as either a duck or a rabbit, Ackerman's formula only highlights the collapse problem. 21

17. It is for this reason that Michelman, after a similar analysis of the takings clause, concludes that the conventional tests are, for the most part, consistent with a (sophisticated) utilitarian analysis. See Michelman, supra note 9, at 1237. It is not clear (except on a crude view of utilitarianism) how Ackerman can both acknowledge that "the conventional categories" are not devoid "of Utilitarian sense," B. ACKERMAN, supra note 1, at 69, and still assert that acceptance of "a Scientific Utilitarian point of view" would require "a rather fundamental overhaul" of legal doctrine, id.

18. B. ACKERMAN, supra note 1, at 222 n.11.

19. See R. POSNER, ECONOMIC ANALYSIS OF LAW 41 (2d ed. 1977). While "efficiency" might not require actual transfer payments, it can be argued that "[i]mprovement is unambiguously presented only when gross benefits are shared to the point where no net losses have been sustained; and compensation must, therefore, be paid." Michelman, supra note 9, at 1177.

20. B. ACKERMAN, supra note 1, at 222 n.11.


22. The collapse problem also emerges clearly in Ackerman's discussion of the contribution that Professor Sax has made to analysis of the takings issue. Sax distinguished governmental "entrepreneurial" activities from "mediational" activities, arguing for greater willingness to compensate for the economic impact of the former than for the latter. This insight, which has increasingly influenced courts, including now the Supreme Court, see Penn Cent. Transp. Co. v. City of New York 438 U.S. 104 (1978), points to an "equal protection dimension of compensation law." Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149, 169-71 (1971); see Sax, Takings and the Police Power, 74 YALE L.J. 36, 64-65 (1964). Viewed as an aspect of equal protection, this feature of takings doctrine has less to do with the concept of "taking property" than with a more pervasive concern about the risk of arbitrary decisions by officials exercising discretion at low visibility levels. Professor Ely suggests that a similar explanation underlies fourth amendment protection against unreasonable searches and seizures. See Ely, Toward a Representation-Reinforcing Mode of Judicial Review, 37 Mo. L. REV. 451, 481 (1972). Penn Central Transportation seems to attest that this equal protection dimension will become increasingly the focus of takings analysis in the cases involving regulations that are otherwise almost automatically upheld so long as some reasonable use of regulated property remains. See 438 U.S. at 133-34.

Ackerman links Sax's analysis to Utilitarianism by noting that the "entrepreneurial/mediational" distinction serves to alert the Utilitarian judge to the possibility that the government as entrepreneur has overvalued its own interests in calculating the costs and benefits of a given activity. B. ACKERMAN, supra note 1, at 51. But he also concedes that the Kantian judge might develop a similar equal protection approach "to cushion the impact of official
Second, even when viewing the matter from the perspective of “fairness,” a Kantian need not conclude that failure to compensate for minor decreases in value amounts to exploitation of those who bear the cost. One plausible explanation for why such treatment is not “unfair” lies in the recognition that “over the life of a society (and within the expectable lives of any of its members) burdens and benefits will cancel out leaving something over for everyone.”

Explaining just what is meant by the Kantian prohibition on using persons as “means rather than ends” is too difficult a problem to be solved by simply equating any disproportionate bearing of costs with “exploitation.” Indeed, for some Kantians, the more difficult problem arises when society can gain only at a cost to individuals that, because of excessive process costs, for example, cannot be paid back out of the benefits of the program. For Ackerman, however, that case is one in which “the Kantian’s simple Principle of Exploitation seems incapable of generating a unique solution.”

Ackerman’s inability to distinguish these approaches in terms of actual differences in result leads him to suggest at times that the difference is to be found in “methodology,” or in what it takes to make out a prima facie takings case. If judges were Utilitarians, for example, we should find that “[j]udicial discussion of the ease of insurance, the costs of disaffection, and the costs of settlement would abound.” Again, however, the fact that opinions do not include such discussion does not necessarily reflect the absence of a Comprehensive View; it could also be charged to indeterminacy: the calculation of psychological and hypothetical insurance costs is so difficult that per se rules, of the same sort that the Ordinary Observer uses, become the standard Utilitarian way of dealing with difficult cases.

Similarly, Ackerman considers two hypothetical statutes designed to deal with the energy crisis. One statute lowers the speed limit to twenty-five miles per hour; the second transports half the nation’s cars to a government warehouse for storage. The economic impact on a two-car family, it is assumed for purposes of discussion, is the same in both cases. For the Ordinary Observer, these are easy cases: there is not even a prima facie taking in the speed limit case (no “thing” has been taken, though its use has been restricted), whereas there is a taking in the case of the storage statute. On the other hand the Scientific Policymaker, Ackerman suggests, will struggle to understand why the cases differ, let alone how they should be decided. But note that the struggle occurs largely, if not entirely, because of the indeterminacy problem, which is so great that even Ackerman

decisions that mark out one property holder, rather than another who seems similarly situated, to serve as the exclusive means to a social end that benefits others.” Id. at 79-80 (footnote omitted). Whether or not Sax developed his theory from an exclusively Utilitarian viewpoint, as Ackerman suggests, id. at 80, the point remains that a choice between Utilitarianism and Kantianism does not necessarily lead in doctrinally different directions.

23. See Michelman, supra note 9, at 1179.
24. B. ACKERMAN, supra note 1, at 75.
25. Id. at 64.
26. Id. at 125.
does not hazard a guess as to what result the Policymaking judge would reach. That being the case, the sensible Utilitarian Policymaker might as well take the rule of thumb offered him by the Ordinary Observer and avoid the cost of the exercise.

There is no need, however, to examine each of Ackerman's examples, for the point can be made in more general terms. Ackerman describes the Ordinary Observer as seeking legal rules that "best support dominant social expectations." But for any Scientific Policymaker, and certainly for any Utilitarian, "dominant social expectations" are likely to be the critical ingredient in attempting to apply the formulae Ackerman provides. What else is more likely to give rise to Uncertainty and Disaffection or to the conviction that one has been unjustly "exploited" than deviation from "dominant social expectations?" Until one explains the interrelation of these key concepts, themselves indeterminate, one cannot expect to be able to show that theories employing the concepts differ either methodologically or substantively.

III.

There is another reason why Ackerman's insistence that Ordinary Observing is uniquely able to explain existing doctrine is unwarranted. That reason lies in the essential indeterminacy of the Ordinary Observing method itself. Ackerman suggests that the method requires simply paying attention to a layman's understanding of what counts as a "taking" of "private property." But the assumption that there is such a common understanding is plausible only with respect to the easy cases, i.e., those in which title or possession (and the accompanying right to exclude) is appropriated, or where severe diminution in value (without a good excuse) occurs. In these cases it is plausible to view the conclusion that "private property" has been "taken" as a logical implication of the concepts themselves: at time $T_1$ the owner has largely unrestricted and exclusive rights to the use of land; that is what we mean by "private property." At time $T_2$, he has lost these rights; that is what we mean by "taking."

But the judge's problem in a takings case is not that he has forgotten what "private property" means; his problem, rather, is deciding how much of it there is in society at any given moment. How does one know, for example, that the owner of a parcel of land is correct in thinking that he ever had a right to largely unrestricted use of the land in the first place? That is the question that the "noxious use" test puts, and that is the question that Ackerman translates, in layman's terms, as whether a "well-socialized person should recognize" that some possible uses of his land are "unacceptably harmful to others."

27. Ackerman is well aware of the "conceptual imprecision" that infects both Utilitarianism and Kantianism. See id. at 84. He suggests that those hostile to one or another view will use that imprecision to discredit "a particular mode of policy making in legal analysis." Id. at 85. What he fails to appreciate is that the imprecision infects his own effort to attribute earth-shattering differences to either of those approaches or to the Observing method itself.
It is around this question that virtually all current takings cases of any difficulty revolve. If the owner has not been deprived of title or possession, and the regulation leaves open the possibility of at least one reasonable use (whether or not it is the most beneficial), the compensation question is almost sure to be dismissed. But how is a court to proceed when value has been significantly destroyed through regulations that the state seeks to justify on the ground that the owner “should have realized” his expectations were inconsistent with “dominant” societal expectations—as in the wetlands cases? Such cases are difficult precisely because there is no “dominant” social view; values are, at best, only in the process of emerging. If social norms were already clearly dominant and hence easily “observed,” Utilitarians, Kantians, and Observers alike could deny the takings claim without difficulty and for the same reason: the risk that neighbors will sue or rezone if a factory is built in the middle of a residential area is so obvious that demands for compensation when the risk materializes will be treated like demands for a refund on a losing sweepstakes ticket. To ignore the foolish is neither to “exploit” them nor to cause uncertainty among the prudent.

More difficult to explain is the case of the factory built in an area long before residential development could have been anticipated, or the previously lawful brewery, rendered worthless by a change in public values—two of the chestnuts of takings lore that provide classic illustrations of how the “noxious use” test can be employed to deny compensation despite drastic destruction of value. It is tempting in these cases to conclude that the Ordinary Observer has no choice but to stop observing and to start evaluating, determining which expectations are “legitimate” by reference to some Comprehensive View of his own. Indeed, Ackerman himself concedes that this may be the only recourse when faced “with the difficulty of identifying dominant social norms at a time of great stress.” But that concession again threatens to put Utilitarians, Kantians, and Observers in the same boat whenever the rowing gets rough: in hard cases all three approaches will require normative rather than empirical analysis.

One might resist this conclusion that normative evaluation is required in such cases by suggesting that the question of the “legitimacy” of frustrated expectations is still to be determined by reference to existing social practices: it just takes very good eyes to trace the shape of the practice. The plausibility of this suggestion would receive support from Ronald Dworkin’s recent and powerfully voiced theories of adjudication. But Ackerman, curiously, views Dworkin as a Policymaker par excellence, rather than as an Observer, because of Dworkin’s insistence on articulate con-

29. See Michelman, supra note 9, at 1238.
32. B. ACKERMAN, supra note 1, at 155.
sistency in judicial decisions. For Ackerman, such consistency is not to be found; the Observer is like the radical intuitionist who refuses to "purchase abstract theoretical consistency at the price of falsifying the structure of dominant social expectation." 34 Yet Ackerman also concedes that most cases that finally reach the courts are likely to involve "intractible disputes" in which "both sides invoke subtly different conceptions of social practice." 35 At this point, the Observing judge "will be obliged to sift social interaction in a very refined way if he is to determine which social pattern merits the privileged judicial status of dominant social norm." 36 How this sifting is to occur we are not told. But since the Observer is not required to deny the possibility that existing practices reflect a consistent Comprehensive View, 37 what is more plausible than for the judge in such cases to follow the path of extrapolating from clear cases to the resolution of hard ones by way of an assumption, such as Dworkin's, of normative consistency? Only in the easiest of cases is the judge likely to be able to decide who is "well-socialized"—and hence whose expectations are legitimate—simply by reference to a "dominant" social intuition.

This specter of the indeterminacy of the Observing approach haunts all of Ackerman's attempts to account for existing case law by reference to that approach. Thus the hypothetical challenge to wetlands regulation referred to earlier is an easy case for the Observer only on the assumption, which Ackerman glides over, that the owner retains title, possession, and valuable remaining uses. 38 I have suggested that on these assumptions the same result can be reached by Utilitarians and Kantians. The case becomes difficult when value is significantly depressed; because of the absence of any reasonable remaining uses, the question then becomes whether prohibiting wetlands development, with its impact on wildlife habitat, water supplies, and other ecological assets, is like prohibiting more traditional "nuisances." That the Observer is of no help to courts in answering this question—in deciding whether marsh development is "noxious" or "innocent"—is evidenced by Ackerman's acknowledgement that "wetland regulations have been upheld and struck down in approximately equal numbers." 39

Ackerman's treatment of Hadacheck v. Sebastian, 40 the venerable brickworks case, reveals the same weakness. There the Supreme Court denied the taking claim, despite vast diminution in value and even though the factory got there first, becoming a "nuisance" only when residential owners subsequently moved in. The decision has been so frequently cited as an illustration of the "noxious use" exception to the diminution in value rule that one would assume it was now part of the doctrinal stock for which Ordinary

34. B. ACKERMAN, supra note 1, at 172.
35. Id. at 95.
36. Id. at 95-96.
37. See id. at 12-13.
38. See id. at 67.
39. Id. at 217 n.54.
40. 239 U.S. 394 (1915).
Observing would account. But Ackerman confesses to grave doubts about the validity of the decision and asserts that it is "not settled law today."\textsuperscript{41} He even reads the more recent \emph{Goldblatt v. Town of Hempstead},\textsuperscript{42} which denied compensation on similar facts in the case of a sand and gravel pit, as an indication of Supreme Court doubt about the case. But others read \emph{Goldblatt} as reaffirming the view that harmful activities can be prohibited without compensation regardless of the economic impact or the foreseeability of the problem when operations began.\textsuperscript{43} Moreover, the continued viability of both \emph{Goldblatt} and \emph{Hadacheck} seems to have been explicitly reaffirmed in the Supreme Court's recent decision in the \emph{Penn Central Transportation} case\textsuperscript{44}—a decision that, to be sure, postdates the appearance of Ackerman's book. In short, either one must again concede that the Observer is no more capable of accounting for "settled doctrine" than the Kantian or the Utilitarian, or one must recast Ordinary Observing to include normative elements that allow for critical evaluation of settled doctrine.

IV.

One can discount Ackerman's exaggerated claims for the difference that philosophy makes and still discover pure gold in his treatment of the takings issue. The chief value of the book, as suggested earlier in this review, lies in the distinction between "Scientific" and "Ordinary" approaches to the application of any of the more general theories—Utilitarian, Kantian, or Observing. It is the layman's view that property consists of physically definable "things," rather than "bundles of rights" or "interests," that explains why the problems confronting those who want to reduce the world to a Scientific common denominator disappear when placed in the world as perceived by ordinary people.

Consider, for example, the problem of trying to decide what entity to select for application of the takings tests. Does one measure diminution in value by reference to "the claimant's entire portfolio" or by reference to "the extent to which the price of the particular thing subject to regulation has plummeted toward zero"?\textsuperscript{45}

For the Scientist who cannot see any difference in the various units of value that make up a person's total assets, the only possible answer is the former. But if it is true that for ordinary persons, values come lumped in "distinctly perceived, sharply crystallized, investment-backed expectation[s],"\textsuperscript{46} each of which constitutes a separate "piece of property," then takings doctrine, tied as it is to focused "expectations," should show a similar solicitude for each of the distinct "things" a person owns.

\textsuperscript{41} See B. ACKERMAN, supra note 1, at 154, 262 n.86.
\textsuperscript{42} 369 U.S. 590 (1962).
\textsuperscript{43} See Sax, Takings and the Police Power, supra note 22, at 42-43.
\textsuperscript{45} B. ACKERMAN, supra note 1, at 143.
\textsuperscript{46} Michelman, supra note 9, at 1233.
This insight into the connection between existing legal doctrine and the world as perceived by ordinary people leads Ackerman to develop one of the most intriguing distinctions in the book: that between “legal” and “social” property. Social property is marked by practices that any well-socialized person would recognize as signifying ownership, e.g., actual control and use of physical space. “Legal property” is property as to which claims of ownership require “the opinion of a legal specialist” as evidence of the claim. Thus, the surface rights to land are social property; the air and mineral rights—at least, prior to actual utilization—are legal property.47

Ackerman argues that claims for compensation based on intrusions on social property are in general stronger than similar claims based on intrusions on legal property. This difference in treatment presumably reflects the difference in the strength of the ordinary expectations surrounding what can be handled and controlled physically, on the one hand, and what can be controlled only because of some legal “mumbo-jumbo,” on the other.48

Regrettably, the examples Ackerman uses seem poorly designed to test his hypothesis. Ackerman contrasts the taking of a strip of land for a highway with an Air Force decision to mark out “a traffic lane two miles overhead for the purposes of military transport.”49 Assuming similar but less than devastating economic impact on the owner’s land in each case, compensation will be required in the case of the highway, but not that of the overflight. The explanation, for Ackerman, lies in the fact that airspace is only “legal property,” whereas surface land is “social property.” Later Ackerman describes the enigmatic Pennsylvania Coal Co. v. Mahon50 as troubling precisely because the court found itself forced to give protection to subsurface mining rights, which, being merely “legally packaged expectations,” 51 did not have a basis in social practice on which ordinary expectations are built.

The examples are poor tests of the hypothesis for several reasons. First, there is at least some authority for the view that the compensation for the land appropriated for the highway does not include compensation for the diminution in value that all neighboring landowners suffer on account of the noise and hazards of the highway.52 What the owner is compensated for is the market value of the strip of land—roughly the price it would have brought if sold. Now, if the economic impact of the air lanes stems solely from the noise and hazards of the overflights, the denial of compensation for those effects parallels the denial of compensation for the similar effects of the highway. And the absence of a market for air traffic lanes could explain

47. See B. Ackerman, supra note 1, at 116-23.
48. See id. at 120. Ackerman rejects this “expectation-based” explanation, which would, after all, allow the Utilitarian to accept and utilize the same distinction. See id. at 238 n.16. But the resistance (in a footnote) seems weak in light of the persuasive textual discussion of the relationship between the legal/social distinction and the “pressing needs” of laymen who happen “to be living... on the surface of the earth.” See id. at 122-23.
49. Id. at 118.
50. 260 U.S. 393 (1922).
51. B. Ackerman, supra note 1, at 164.
why no compensation is required for the virtual appropriation of those lanes by the Air Force. 53 (This analysis would also explain why Ackerman is prepared to reach a different result if the building of a two-mile-high skyscraper on the owner's land were a real possibility.) 54 In short, the two cases can be viewed as yielding different results, not because of differences in the means by which one evidences his claims of ownership, but because of the existence of a normal market for surface space and the absence of such a market for air space. Furthermore, subsurface mineral rights are like surface space in that they have clearly established markets and value, whether one has actually commenced mining or only holds legal documents that establish ownership. Thus, if the government were to construct a subway route through such an area, the taking claim would surely be treated no differently than in the case of the highway. 55

What makes Pennsylvania Coal difficult is that, in contrast to the subway and highway examples, that case involved a regulation prohibiting a contemplated use, rather than government invasion or takeover. And what divides majority and dissent in the case—as well as commentators—is not whether subsurface rights are somehow less real than surface rights, but whether the severe diminution in value that results is justified because of the subsidence of surface land that the regulation was designed to prevent.

Ackerman is right, in short, to look for the expectations that the takings clause protects in the reactions of ordinary people; where he errs is in suggesting that the distinction he draws between "legal" and "social" property is necessarily an accurate reflection of such expectations. An "ignoramus" 56 might sell mining rights for a pittance, just as he might give away apparently worthless surface land, which in the hands of a speculator could prove immensely valuable. In both cases, ignorance of a sort is present. But it is not ignorance of the fact that property can extend beyond what is visible or under immediate physical control. Indeed, the value of Ackerman's Scientific/Ordinary distinction depends heavily, as the remaining sections suggest, on the assumption that the legal ignoramus is no more the measure of the "ordinary" layman than is the foolish person who builds his factory in the middle of a residential area.

V.

Whatever the weakness of the legal/social property distinction, Ackerman's major thesis—that existing doctrine reflects distinctions that ordinary

53. The cases that have compensated for damage from overflights have involved severe diminution of the value of the underlying tract, not the "less than devastating" impact posited by Ackerman in his example. See, e.g., United States v. Causby, 328 U.S. 256 (1946). But Ackerman's distinction would apparently require compensation for all low glide paths, these being within the "reach" of social property, no matter how small the diminution in value. See B. ACKERMAN, supra note 1, at 238 n.20, 258-59 n.74.
54. See id. at 122.
56. B. ACKERMAN, supra note 1, at 122.
people make but that Scientists find indefensible—remains plausible. As mentioned above, the thesis comes closest to explaining the current judicial approach to the problem of determining what entity to take as the unit for measuring diminution of value. It also arguably explains the harm/benefit distinction that leads courts to find a taking where severe regulation appears to “benefit” the public, but to find no taking where such regulation protects the public from harm. The rationale behind this distinction, which leads back to the brickworks case and ultimately touches the core of every difficult takings case today, has proved incredibly elusive.

For the Scientist, there is no critical difference between withholding a benefit and imposing a harm: both result in a reduction of the net welfare that would otherwise obtain. Professor Michelman suggests that redistributive, rather than efficiency, considerations underlie the refusal to compensate in the anti-nuisance case: the creator of a nuisance, like a thief, cannot complain when welfare he has “grabbed” (however more efficient in the grabber’s hands) is restored. But, as Michelman recognizes, the analogy to theft explains only the most obvious case. If the prohibited land uses are, like the theft, unlawful in the first place and hence subject to civil and criminal actions, it is hard to see what room there is for complaint just because the legislature, rather than the court, orders restoration. In contrast, the brickmaker whose manufacturing begins “innocently” (e.g., neighboring land is vacant) does not take value: he “crystallizes” value where none was apparent. If the argument is that brickmakers should purchase a buffer, one could equally well claim that he who first breaks wilderness ground for a residence should buy a buffer: by his act he will “foreclose his neighbor from the choice of building a brickworks, if the rule is that brickmakers must give way to homebuilders.”

Uncertainty as to which of these parties is creating the nuisance has led Professor Sax to suggest that all such cases be recognized as “conflicting demands ... on a common resource base”: “the homeowner demanding quiet imposes on the noise-making airport just as much as the airport users’ demand to conduct noise-producing activity impinges on the homeowner.” For Sax, the solution is to find no “taking” if the effect of the government regulation is simply to settle this conflict.

Consider now how this problem appears from the ordinary layman’s perspective. Until the Scientist takes his perception apart, the ordinary person will see a clear difference between the brickmaker and the airport, on the one hand, and the peace-loving residential owner, on the other. The
former are unable to confine the actual physical effects of their choice of land use to the boundaries of their property. Their uses "spill over" in a way that the residential owner's quiet occupation does not. The preferred status of the latter in the resulting conflict follows from the simple perception that people who use their property in ways that have adverse physical effects beyond their boundary lines have less reason to be surprised when neighbors retaliate. To be sure, if this perception is reflected in a law requiring abatement or denying compensation for regulation of the nuisance, the legal effect will restrain the offending owner. But that "legal spillover" is a consequence and, hence, reaffirmation of the underlying preference that the Ordinary Observer accords to the "noninterfering" land use.68

None of this is meant to suggest that the ordinary layman will always clearly discern the difference between preventing harm and appropriating benefit. Aesthetic regulation illustrates the potential difficulty. An ordinance designed to protect the public from obvious unsightliness is likely to find judicial acceptance despite the impact on economic value.64 But an ordinance designed to secure for continued public enjoyment the scenic or historic features of one's land cannot be defended by explaining that the ordinance only defends the public against possible unsightly uses of the land by the owner. On the contrary, the public in such a case appears to have invaded and laid claim to pleasurable but harmless features of the owner's

63. Michelman employs two additional arguments to demonstrate that the owner of the "brickworks-in-the-wilderness" can no more be charged with fair warning or notice than can the owner of the "residence-in-the-wilderness." First, he suggests that "grabbing welfare" by building a factory that has physical effects on vacant neighboring land is like picking up a rare jewel or capturing a wild animal on neighboring land. In the latter case one is not exposed to "retroactive demands to disgorge" just because he knew that the act foreclosed others "from the chance to acquire the particular asset." Michelman, supra note 9, at 1244.

What this analogy-based argument ignores is the fact that the factory is not content to pollute and run. It continues to impose its "servitude" after the owner arrives. If I use my neighbor's vacant, idle land as a jogging course, the claim that I have "determined . . . destiny . . . thenceforth indeterminate," id. at 1245, will fall on deaf judicial ears when my neighbor arrives to establish an inconsistent destiny for that land—unless, of course, I can claim prescription. Cf. RESTATEMENT (SECOND) OF TORTS § 840D, at 123 (Tent. Draft No. 16, 1970) ("coming to the nuisance" as a factor to be considered in determining whether nuisance actionable). See generally W. RODGERS, ENVIRONMENTAL LAW § 2.9 (1977) (discussing nuisance defenses of prescriptive rights, estoppel, laches, and statute of limitations). Even the jewel, after all, does have to be disgorged when and if the rightful owner shows up.

Second, Michelman argues that the brickmaker has no way of knowing how extensive a buffer to buy because, by hypothesis, it is not yet determined whether and to what extent brickmaking will interfere with neighboring uses. To the obvious response that he should assume the worst, i.e., insulate all substantial effects or take the risk of subsequent regulation, Michelman's reply is that "he is, after all, a brickmaker . . . . Requiring him to invest in some other enterprise against his will is, then, presumably inefficient, apart from being an infringement of his liberty for purposes wholly speculative." Michelman, supra note 9, at 1243. But the jogger, making the same argument, would get nowhere: he must either buy the land or risk ejection if the owner decides to use it in conflicting ways. In both cases, ordinary notions of boundary lines, trespass, and ownership converge to justify limiting persons' expectations regarding the permissible uses of land to those uses that do not spill over excessively into an area that is not one's own. See Soper, The Constitutional Framework of Environmental Law, in FEDERAL ENVIRONMENTAL LAW 20, 65-66 (E. Dolgin & T. Guilbert, eds. 1974).

64. See, e.g., Oregon City v. Hartke, 240 Or. 35, 49-50, 400 P.2d 255, 263 (1965) (total exclusion of junkyards from city upheld as means of preventing "unsightliness").
land. The fact that this line between protection from visual blight and appropriation of visual delight is sometimes hard to see gives rise to the scientific impulse to obliterate the difference. It also explains why the wetlands cases are so difficult; we cannot tell whether restrictions on development serve more to protect the public from harm, e.g., impairment of the water supply, or to appropriate desirable features of the marsh, e.g., wildlife refuge and habitat. But the fact that ordinary perceptions will also run up against borderline cases does not make any less real the distinctions perceived on either side of the line.

Of course, the Scientist might respond that what is at issue is not the de facto expectations that underlie ordinary perceptions, but the legitimacy of those expectations. If ordinary distinctions are in fact indefensible, compensation law should not continue to reinforce them; instead, it should begin the process of correcting defective social vision.

But what can this ultimate challenge of the Scientist mean? Recall that at least one reason why we abandoned the attempt to arbitrate between Ordinary and Scientific modes of discourse by reference to competing Comprehensive Views is that these views evaporate long before we can test them in any hard case. The question now is with what perceptual facts theory should begin, and that question—what is the "rational" way of perceiving the world—seems difficult to answer except by reference to the way in which ordinary, rational people do in fact perceive the world.

One can, of course, say more about what underlies ordinary categories of reference. Ackerman's legal/social property distinction, for example, though crudely drawn, is a long step in the right direction toward determining the unit of property for purposes of applying the diminution of value test: it suggests that a combination of spatial and functional contiguity notions will figure in any attempt to apply the test. For example, I have two one-acre farms if one is located in Alaska and one in Michigan, but I have one two-acre farm if the land is contiguous. Car and house may be spatially contiguous, but their obviously different functions make each a separate piece of property. Or, to use Ackerman's example, if a speculator is prevented from some contemplated forms of development of his vacant property by a given regulation, he has suffered no taking as a result of that regulation as long as some reasonable use of the property remains. In contrast, if continued operation of Hamburger Heaven is prevented by the same regulation, the owner of that business may have a taking claim, one that can be measured with reference to the distinct function—the hamburger stand—to which he has chosen to devote the property. As for the line

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65. See cases cited in Michelman, supra note 9, at 1196 n.66. But see Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133-34 n.30 (1978) (suggesting that the noxious/innocent distinction is no longer critical and that, in any event, alteration of historic landmarks is "harmful").

66. Cf. J. VINING, LEGAL IDENTITY 24 (1978) ("There are limits to the movement of our minds, shared boundaries for which there is no better name in legal analysis than 'concepts'—conclusions that we could question but choose not to, premises for ordered thought and communication.").
between "benefit" and "harm," what seems to underlie the perceived difference here is a sense of a normal status quo. Subtractions from that normal state are harmful; additions to it, beneficial. "Pleasure" and "pain" are two different sides, however much the scientist or philosopher may insist that they belong to the same coin.67

But after all is said and done, these probings leave intact the main force of Ackerman's thesis regarding the impact of ordinary perceptions on actual judicial practice: the world remains stocked with tables and chairs, however isomorphic with a world of color patches and relational predicates.68 Nor is this to say that perceptions cannot be changed or that they are entirely culture free—as those who point to the variety of Eskimo words for "snow" and "white" are fond of noting. But such anthropological tests of the "normalcy" hypothesis only underscore the sense in which "legitimacy" in this connection is linked to current, ordinary modes of perception—changing, if at all, only by slow evolution rather than by the leaps of abstract reason, freed of the weight of ordinary, messy experience.

Many of these themes surface in the Penn Central Transportation case: 69 has the railroad's property been taken when development over Grand Central Terminal is prohibited in order to preserve the Terminal's historical and cultural value? If the prohibition on development had left no reasonable use of Penn Central's property, the interesting question would have been whether an exception to the diminution in value rule could have been found in order to justify a refusal to compensate.

The "noxious use" exception seems inappropriate if one concludes, as Penn Central argued, that this was more a case of public insistence on continued enjoyment of the landmark than one of protection from visual harm.70 Nevertheless, though it is easier to construct a layman's "fair warning" explanation of the refusal to compensate when the public protects itself from harm, it is not impossible to construct a similar explanation of some regulations designed to secure a public benefit. The analogy would be not to nuisance concepts, however, but to concepts of adverse possession and prescription. Under this approach the critical question would be when the cultural and historical significance of a landmark like the Terminal becomes so

67. It is as impossible for me to avoid acknowledging my debt to Michelman in this essay as it is for Ackerman in his book. But Michelman, while recognizing the strong intuitive appeal of the harm/benefit distinction, glides over the possibility that we can make sense of the implication on which the distinction rests: viz., that "we can establish a benchmark of 'neutral' conduct" which divides withholding of benefits from inflicting of harms. Michelman, supra note 9, at 1197. For Michelman, the benchmark of "neutrality" puts the brickmaker-who-gets-there-first on the "innocent" side, but for reasons that seem to take us back to efficiency explanations. See note 63 supra. The point here is that for ordinary people, neutrality has to do with border crossings and territorial prerogatives, which, as Ackerman suggests, is where laymen live.

68. See note 15 and accompanying text supra.


70. The precedential force of the Court's suggestion that the "noxious" quality of the enjoined activity is no longer critical, and that landmark alteration, in any event, is harmful, id. at 133-34 n.30, is difficult to predict, since the finding that Penn Central still enjoyed a reasonable use of the property is enough by itself to justify denying compensation.
great that the owners could be said to have received warning that the public's "use and enjoyment" of the property will receive primary consideration in a determination of the uses to which the property may be put.

By deciding that Penn Central had been left with a "reasonable return" on its property, the Supreme Court avoided all such inquiries. Apparently, absent equal protection problems, failure to meet the diminution in value test will now defeat a takings claim in the context of any otherwise reasonable regulation, regardless of the harm/benefit distinction. The division between majority and dissent turned on the unit of reference problem: the dissent saw the air rights as a separable piece of property whose value was entirely destroyed; the majority looked to "the parcel as a whole" and saw the air rights as only a part of the property, deprivation of which still left a healthy remainder. The majority's view as to what counted as "the parcel," and hence how the case differed from Pennsylvania Coal, drew on both spatial and functional contiguity concepts: the parcel was the city tax block designated as the landmark site, and Penn Central's primary expectation—operation of a railroad terminal—had not been destroyed. In the coal case, in contrast, the company's investment-backed expectations—mining rights and nothing else—were totally eliminated.

VI.

I have gone somewhat beyond Ackerman's exploration of the distinction between Ordinary and Scientific modes of discourse and his idea that legal doctrine builds more on the former than the latter. I could undoubtedly go further, for the same judicial resistance to "reductionism" probably underlies other distinctions that the Scientist finds puzzling but that the law continues to reflect: the distinction between misfeasance and nonfeasance, between positive and negative duties, and even between those entities that do and those that do not qualify as "human beings." This is not the place, however, for further exploration of the phenomenon. In the end, the basic question will remain: how does one justify the categories around which analysis revolves? And in the end, in his final chapter, Ackerman returns to this issue as the fundamental issue confronting jurists and the development of legal doctrine generally: whether critical evaluation is possible on an independent and objective basis, or whether, objectivity being impossible, nothing remains as a reference point but the brute facts of social practice, tradition, and culture.

Just as Ackerman's initial analysis, although immensely provocative and valuable, requires divestment of its hyperbole concerning the critical difference that philosophy makes, so too does this final suggested link

71. See note 22 supra.
72. Cf. Wertheimer, Understanding the Abortion Argument, 1 PHILOSOPHY & PUB. AFF. 67, 86 (1971) ("Without an agreement in judgments, without a common response to the pertinent data, the assertion that the fetus is a human being cannot be assigned a genuine truth-value.").
between ordinary discourse and philosophical nihilism. The difference between Scientific and Ordinary categories of reference is real and important, but neither entails nihilism. Legal doctrine's heavy reliance on ordinary modes of perception is justifiable on normative grounds, as this essay has argued: first, the link between "property" and existing, dominant expectations is in large part analytical, at least in the paradigmatic, easy cases. Second, Utilitarians and Kantians alike can justify protecting the dominant expectations in these easy cases. Third, in difficult cases, where social expectations are themselves in flux, none of these approaches, including Ackerman's Observing variety, points to a clear solution; they do not even point in clearly different directions toward a solution. In these cases, the temptation to leave Ordinary categories behind for Scientific ones derives not so much from the wish to avoid nihilism as from the wish to avoid uncertainty: reductionism does offer superficially attractive possibilities for narrowing the range of uncertainty by translating diverse values into commensurable units.

But there are good reasons for resisting the temptation, reasons drawn from the nature of the subject matter and from the limits of moral philosophy emphasized at the beginning of this review. The natural sciences can hardly be faulted for employing concepts and technical constructs beyond the understanding of lay persons. That is simply a reflection of the complexity of the universe that scientists are trying to understand. But when moral philosophy takes the same route, leaving the lay world behind in its construction of elaborate proofs and sophisticated analyses, it threatens to lose touch with its subject matter, with the attempt to understand the nature of moral life. Legal doctrine cannot afford the luxury of becoming a professional's intellectual pastime. The relevance of moral philosophy to the development of norms for governing a society of ordinary people lies in a few broad generalizations: Utilitarianism, for example, emphasizes that we are part of a social whole; Kantianism reminds us, on the other hand, that we are not mere appendages of the social body. And the task of judges, to maintain the balance between these poles while the philosophers are still out, requires practical reasoning that does not yield easily to unified field theories. To look for more is to ignore the injunction of one of the first philosophers to seek "precision in each class of things just as far as the nature of the subject admits." 73

But uncertainty and imprecision are not the same as nihilism. To put the point in Ackerman's terms, what is wrong with Ordinary Policymaking? Ackerman briefly considers such a possibility at the beginning of his book but rejects it out of hand.74 He does so because he believes that ordinary social structures, filled "with the tensions and inconsistencies of their common forms of life," cannot plausibly be thought to form the "larger,

73. ARISTOTLE, NICOMACHEAN ETHICS, I. iii. 1094b. 24-27 (trans. W. D. Ross) (quoted also in B. ACKERMAN, supra note 1, at 199 n.24).
74. See B. ACKERMAN, supra note 1, at 20.
consistent, normative pattern” that Policymaking entails. But once it is recognized that Policymaking of any variety encompasses huge areas of indeterminacy, it then becomes possible to accept ordinary modes of perception while still maintaining belief in a Comprehensive View, undiscoverable though it may be. The Ordinary Policymaker would assume—though the point could not be proved or disproved—that at some level there is consistency and meaning in our dominant practices—particularly if one of our dominant practices includes seeking, and expecting courts and officials to seek, Comprehensive Views. That would explain why the dispute between Utilitarians and Kantians is worth continuing even though it will never be resolved. That would explain why courts write opinions the way they do, justifying results by reference both to past practice and presumed normative consistency. And that would explain—better, perhaps, than painfully detailed Utilitarian and Kantian formulae—what is in fact important in difficult takings cases: the best guard against citizen Disaffection and Uncertainty or the perception of exploitation is the widespread belief that officials with the power to affect ordinary expectations are trying in good faith to make sense of it all.

75. See id. at 179-80.